No. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Burton was given an exceptional sentence of 258 months *above* the 305 month ceiling of the statutory sentencing range and this Washington State sentence became final after *Apprendi v. New Jersey*, but before *Blakely v. Washington*:

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?
2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

LONNIE L. BURTON, PETITIONER,

v.

DOUG WADDINGTON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lonnie Burton petitions for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit was filed on July 28, 2005, and is attached at App. 1a. The Ninth Circuit denied Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc. This order is reproduced at App. 4a.

JURISDICTION

The Ninth Circuit issued its opinion on July 28, 2005. The Ninth Circuit denied Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc on October 13, 2005. On December 28, 2005, Justice O'Connor extended the time within which to file this petition for a writ of *certiorari* to and including February 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. On October 24, 1994, Mr. Burton was convicted of rape in the first degree (count I), robbery in the first degree (count II), and burglary in the first degree (count III).

When Mr. Burton was sentenced on March 13, 1998,[1] the sentencing court calculated the statutory standard range to be 234-304 months on the rape charge, 153 months to 195 months on the robbery charge, and 105-134 months on the burglary charge. Under Washington law, such sentences presumptively run concurrently. *See* Wash. Rev. Code § 9.94A.400 (1998). "Consecutive sentences [for these convictions] may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(g) or any other provision of RCW 9.94A.390." *Id.*

In this case the sentencing court imposed an exceptional sentence 258 months *above* the 304 month maximum of the statutory standard range when it ordered that the standard range sentences for these offenses run consecutively. Specifically, the court imposed a prison term of 304 months on the rape charge, 153 months on the robbery charge, and 105 months on the burglary charge and then ordered that the prison terms run *consecutively*.[2]

---

[1]This was Mr. Burton's third sentencing on these offenses. He was first sentenced on December 9, 1994, to an exceptional sentence of 562 months. He was resentenced in April 1995, with a lower offender score after an earlier conviction was overturned. At this second sentencing, the judge again imposed an exceptional sentence of 562 months. Mr. Burton appealed this second sentence and the Washington Court of Appeals ordered Mr. Burton be resentenced on grounds unrelated to those presented in this petition.

[2]The sentencing court also imposed an alternative exceptional sentence of 506 months on the rape conviction, 153 months on the robbery conviction and 105 months on the

In support of this upward departure from the statutory standard range, the court made the following findings pursuant to Wash. Rev. Code § 9.94A.390: (a) the "defendant's long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act"; (b) the defendant's actions amounted to "deliberate cruelty" to the victim; (c) the defendant's actions "demonstrate sophistication and planning of sort that makes the defendant a significantly different offender." Findings of Fact and Conclusions of Law Regarding Imposition of Exceptional Sentence at 8-10. Mr. Burton contested these findings.

2. Mr. Burton appealed his sentence to the Washington Court of Appeals. That court denied relief on July 17, 2000, more than one month after this Court's June 6, 2000 opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On December 5, 2000, the Washington Supreme Court denied Mr. Burton's request for review. Accordingly, Mr. Burton's appeal did not become final for retroactivity purposes until March 5, 2001. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

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burglary conviction. This alternative sentence was vacated by the Washington Court of Appeals for reasons unrelated to this petition.

3. Mr. Burton subsequently filed a Personal Restraint Petition challenging his exceptional sentence under *Apprendi v. New Jersey*. The Supreme Court of Washington denied relief, stating: "*Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime." Ruling Denying Review, No. 72657-4 (July 16, 2002).

4. Mr. Burton filed a habeas petition in January 2002, arguing that his "sentence in excess of top of range set by statute violated due process when factors used to support it were not submitted to a jury and proven beyond a reasonable doubt." The district court denied Mr. Burton's petition.

5. Mr. Burton sought a certificate of appealability on his *Apprendi* claim. The Ninth Circuit initially denied this request, but the day after this Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), the Ninth Circuit granted a certificate of appealability on the *Apprendi* claim. Mr. Burton argued that *Apprendi* compelled the conclusion that his exceptional sentence under Washington's Sentencing Reform Act was unconstitutional.

6. The Ninth Circuit affirmed the district court's denial of habeas relief. *See Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005), App. 1a. Relying on *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005) which addressed the identical issue a few weeks earlier, the Ninth Circuit held that *Blakely* "established a new rule that does not apply retroactively on collateral review." *Id.* at 299. Then, citing only pre-*Blakely* precedent

about the *non-statutory* Federal Sentencing Guidelines, the Ninth Circuit also held that "[b]ecause the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*." *Id.* at 299-300. The Ninth Circuit did not explain why these cases compelled the same result under Washington's *statutory* sentencing scheme.

7. Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 13, 2005.

REASONS FOR GRANTING THE PETITION

This Court has held that under the doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989), new procedural rules do not apply retroactively unless they fall into one of two exceptions. *See Beard v. Banks*, 542 U.S. 406, 411 (2004). The lower courts are divided over whether *Blakely* is a new rule. This Court should grant this petition and conclude that the holding in *Blakely* is not a new rule. If this Court decides *Blakely* is a new rule, it should address the important issue of whether *Blakely* applies retroactively and conclude that it does.

A. This Court Should Resolve the Split of Authority on Whether *Blakely* Is a New Rule.

1. The Courts Are Divided Over this Issue.

The Ninth Circuit has held that *Blakely* announced a new rule. *See Burton*, 142 Fed. Appx. at 299-300297, App. 3a; *Schardt*, 414 F.3d at 1032-35. The sole articulated rationale for the Ninth Circuit's conclusion is that "[e]very circuit court of appeals that

addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *See Schardt*, 414 F.3d at 1035. In support of this statement, the Ninth Circuit relied *exclusively* on cases that addressed whether the *Apprendi* rule should be applied to the *non-statutory* Federal Sentencing Guidelines, not the *statutory* guidelines at issue in *Blakely* and Mr. Burton's case. *Id.*

One other federal circuit court has also held that *Blakely* announced a new rule. Addressing the application of *Blakely* to a petitioner sentenced under the Federal Sentencing Guidelines and whose sentence was final after *Apprendi* but before *Blakely*, the Tenth Circuit held that *Blakely* announced a new rule. *See United States v. Price*, 400 F.3d 844, 846-48 (10th Cir. 2005). The Tenth Circuit reasoned that before *Blakely*, the Tenth Circuit and other circuit courts held that *Apprendi* did not apply to judge-determined facts that resulted in a sentence below the statutory maximum and that it was not until *Blakely* that the "Supreme Court clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *Id.* at 847 (quoting *Blakely*). The Tenth Circuit, like the Ninth Circuit, supports this reasoning by citing only cases involving the *non-statutory* Federal Sentencing Guidelines, not the *statutory* guidelines addressed in *Blakely*. *Id.* at 847.

In direct conflict with the Ninth and Tenth Circuits, the Tennessee Supreme Court held that *Blakely* is not a new rule. *See State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn.

2005). The Tennessee Supreme Court reasoned that the "language of *Booker* demonstrates that the United States Supreme Court does not regard *Blakely* as having announced a new rule of law." *Id.*

The Colorado Court of Appeals has also held that *Blakely* did not announce a new rule. *See State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005). It concluded that *Blakely* simply "applied and explained a rule expressed in *Apprendi*." *Id.* at 286.

The conflict between these courts cannot be resolved without this Court's intervention. As the Tennessee Supreme Court noted, "Although some other courts and jurists have concluded that *Blakely* announced a new rule, the United States Supreme Court is the final arbiter of this issue." *Gomez*, 163 S.W.3d at 650.

2. The Decision Below Contravenes This Court's Precedent.

The Ninth Circuit's rejection of Mr. Burton's argument that the *holding* in *Blakely* is a "new rule" ignores this Court's analysis in both *Blakely* and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 which, while not expressly addressing the issue, make clear the holding in *Blakely* is not a new rule, and contravenes this Court's precedent on the definition of a new rule.

Straightforward application of *Apprendi* was all that was necessary to decide *Blakely*. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it");

R. Craig Green, *Apprendi's Limits*, 39 U. Rich. L. Rev. 1155, 1169-82 (2005) ("the Court simply restated and applied *Apprendi*'s rule" in an "identical" manner).

Apprendi involved two statutorily established sentencing thresholds: one for committing the crime without racial motivation, and one for committing that class of crime with a racial motivation. This Court ruled that the "statutory maximum" was the maximum statutory sentence the defendant could receive "if punished according to the facts in the jury verdict alone." 530 U.S. at 483; *see also id.* at 469.

In *Blakely*, this Court again addressed the situation involving two statutorily established thresholds – one for committing the crime without exceptional circumstances, and one for committing that class of crime with exceptional circumstances – and using almost verbatim language from *Apprendi*, held that its "precedents make clear" that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303. This Court continued: "The 'maximum sentence' is *no more* [the outer limit for the class of felony] here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) . . . ." 542 U.S. at 304.

Neither the *Blakely* majority nor any of the dissenters even hinted that holding in *Blakely* broke any new ground; the disagreement between the majority and the dissenters was on the merits of the *Apprendi* decision itself, not whether *Apprendi* dictated the result

in *Blakely*.[3] *Compare with Banks*, 542 U.S. at 415 (relying on the existence of dissenting opinions in *Mills v. Maryland*, 486 U.S. 367 (1988) to support argument that *Lockett v. Ohio*, 438 U.S. 586 (1978) did not compel the result in *Mills* where the very reason for the dissent in *Mills* was the argument that the *Lockett* principle did not compel the result in *Mills*).

To be sure, the *Blakely* decision startled many observers and has had a substantial impact on state sentencing systems. It rendered portions of Washington's and other states' determinate sentencing systems invalid. But the most that can be said of this outcome is, as Justice Breyer put it, that "[t]he Court [made] clear that it mean[t] what it said in *Apprendi*." *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting).

Making clear that a prior opinion meant what it said does not announce a new rule. The new rule must "break[] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Because the holding in *Blakely* "was *dictated* by then-existing precedent" it was not a new rule. *Banks*, 542 U.S. at 413.

At the same time, one passage of *Blakely* went beyond the facts of the case. After applying *Apprendi*'s rule, this Court added: "When a judge inflicts punishment that the

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[3] *See, e.g., Blakely*, 542 U.S. at 306 ("Those who would reject *Apprendi* are resigned to one of two alternatives."); *id.* at 310 (rebutting argument "that *Apprendi* works to the detriment of criminal defendants who plead guilty"); *id.* at 311-12 (rebutting contention "that *Apprendi* is unfair to criminal defendants"); *id.* at 312 (rebutting argument "that *Apprendi* will attenuate the connection between 'real criminal conduct and real punishment'"); *id.* at 328 (Breyer, J., dissenting) ("the Court makes clear that it means what it said in *Apprendi*.").

jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304. This alternate formulation of the *Apprendi* rule was significant because it suggested for the first time that the rule applied to binding sentencing thresholds *that are not statutes*, such as the Federal Sentencing Guidelines. Yet, as explained above, this passage was unnecessary to decide *Blakely* because both of the thresholds in that case, as in *Apprendi*, were statutes. *See* Stith, *supra*, at 255-57.

Subsequently, *United States v. Booker* extended the Sixth Amendment to cover all legally binding sentencing thresholds, not just statutory thresholds. And it did so with reasoning that confirms that *Blakely* was dictated by *Apprendi*. This Court reiterated its statement in *Blakely*, that "the requirements of the Sixth Amendment were *clear*" in *Blakely*. *See Booker*, 125 S. Ct. at 749 (emphasis added). It then acknowledged that, in contrast to *Blakely*, "the language used in our holding in *Apprendi*" does not cover the Federal Sentencing Guidelines, because the Guidelines' sentencing thresholds are not statutory. *Id.* at 753; *see also* R. Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 Geo. L.J. 395, 401 (2005) (*Booker* had to "br[eak] new ground" for this reason). This required the Court assess the general "principles [*Apprendi*] sought to vindicate." *Booker*, 125 S. Ct. at 753. After doing so, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis of the accusation is a statute or in

guidelines promulgated by an independent commission." *Id.*

The *Blakely* and *Booker* holdings are not the same. Mr. Burton is not asking this Court to address whether *Booker* announced a new rule. The only question Mr. Burton asks this Court to consider is whether the *holding* of *Blakely* is a new rule.

B. This Court Should Resolve the Important Issue of Whether *Blakely* Applies Retroactively If It Is a New Rule.

If *Blakely* is a new rule, its requirement that facts resulting in enhanced statutory maximums must be proved beyond a reasonable doubt applies retroactively to cases such as Mr. Burton's where sentences were based on contested facts proved only by a preponderance of the evidence. This Court has already held, in a combination of decisions, that rules related to the reasonable doubt standard apply retroactively. In addition, under the *Teague* test, reasonable doubt is a fundamental interest of transcending value necessary to the accuracy of criminal proceedings.

1. Through a Combination of Cases, This Court Has Already Made *Blakely* Retroactive.

In *Tyler v. Cain*, 533 U.S. 656, 666 (2001), this Court held that a new rule may be made retroactive through a series of Supreme Court cases. In concurrence, Justice O'Connor expounded:

> This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule.... [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.

Tyler, 533 U.S. at 668-69 (O'Connor, J., concurring). The rule in *Blakely* is precisely this type of rule.

This Court held that its decisions in *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) apply retroactively because of the role of the reasonable doubt standard in assuring that punishment is only inflicted on the guilty. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972).

In *Ivan V.*, this Court gave the rule announced in *Winship* retroactive effect because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 407 U.S. at 205. Then, in *Hankerson*, the Court relied on *Ivan V.* to apply *Mullaney* retroactively because "the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Hankerson*, 432 U.S. at 242.

For the same reasons that *Ivan V.* controlled the retroactivity analysis in *Hankerson*, *Ivan V.* and *Hankerson* control the analysis here. *Blakely* is the precise example of a situation in which retroactivity is "necessarily dictate[d]" by an earlier decision of the Supreme Court. *Tyler*, 533 U.S. at 666.

2. If *Blakely* Announced a New Rule, Its Requirement of Proof Beyond a Reasonable Doubt is A Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The *Teague* Rule On Retroactivity.

Under the second exception to the rule against the retroactive application of new constitutional rules, a rule applies retroactively "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *See Teague*, 489 U.S. at 307. Such a rule vindicates two discrete concerns: the fundamental fairness of the underlying proceeding; and the accuracy of that underlying criminal proceeding. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

The reasonable doubt element of *Blakely* is precisely the type of rule covered by *Teague*'s second exception. *See generally Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005) (tracing the roots of accuracy as requiring retroactivity and opining that *Apprendi* should apply retroactively). This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), demonstrates that the reasonable doubt standard is both fundamental and necessary to accuracy in criminal cases.

In *Schriro*, this Court concluded that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to Arizona's capital sentencing scheme, does not apply retroactively under *Teague*. The Court reiterated *Teague*'s second exception for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 352. It then elaborated: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of

an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313). Under this analysis, the Court rejected the Ninth Circuit's conclusion that *Ring* fell within the second *Teague* exception, concluding that judicial factfinding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Id.* at 356.

In *Schriro* this Court also recognized the fundamental role that the reasonable doubt standard plays in assuring accuracy in criminal proceedings. The Court had no question *Apprendi* rights were "fundamental." *Schriro,* 542 U.S. at 358. The question became whether the difference between judicial and jury factfinders jeopardized the accuracy of convictions sufficiently to require retroactive application of the new rule. The analysis of the competing strengths and weaknesses of factfinders assumed application of the beyond a reasonable doubt standard of proof. The jury trial right only applied prospectively because judicial factfinding beyond a reasonable doubt adequately protected accuracy. Under a preponderance standard, however, the protection of accuracy is as lacking as the right to a jury.

This Court has reiterated the central role of the reasonable doubt standard to protecting the rights of the accused and the accuracy of criminal convictions in many other contexts before *Schriro*. In finding that reasonable doubt instructional error could not be harmless, the Court emphasized the vital role of the reasonable doubt standard in avoiding convictions based on factual error. *See Cage v. Louisiana*, 498 U.S. 39, 39-40

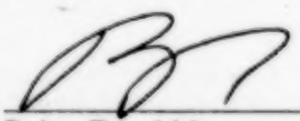
(1990) ("[I]t is a prime instrument for reducing the risk of convictions resting on factual error."). In *Winship*, the Court stated that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." 397 U.S. at 363.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

DATED this 10th day of February 2006.

Respectfully submitted,



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Appendix

142 Fed.Appx. 297, 2005 WL 1793351 (C.A.9 (Wash.))
(Cite as: 142 Fed.Appx. 297)

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,Ninth Circuit.

Lonnie Lee BURTON, Petitioner-Appellant,

v.

Doug WADDINGTON, Respondent-Appellee.

No. 03-35095.

D.C. No. CV-02-00140-RSL.

Argued May 3, 2004.

Submission Vacated May 11, 2004.

Submitted July 28, 2005.

Decided July 28, 2005.

Background: State inmate filed petition for writ of habeas corpus. The United States District Court for the Western District of Washington, Robert S. Lasnik, J., denied petition, and petitioner appealed.

Holdings: The Court of Appeals held that:

1(1) petitioner did not have to seek leave to file second or successive habeas petition;

2(2) finding that sentencing court was not vindictive in imposing exceptional sentence was reasonable; and

3(3) imposition of exceptional sentence did not violate *Apprendi*.

Affirmed.

West Headnotes

[1] Habeas Corpus 197 ⇐894.1

197 Habeas Corpus

197IV Operation and Effect of Determination; Res Judicata; Successive Proceedings

197k894 Refusal to Discharge; Subsequent Applications; Prejudice

197k894.1 k. In General. Most Cited Cases

State inmate was not required to seek leave to file second or successive habeas petition, despite dismissal of his prior petition, where no meaningful relief could have been available when first petition was filed, since inmate's challenge to his sentence was still pending before state court of appeal. 28 U.S.C.A. § 2244(b)(3)(A).

[2] Habeas Corpus 197 ⇐507

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k503 Judgment, Sentence, or Order

197k507 k. Excessiveness. Most Cited Cases

State court's determination that sentencing court was not vindictive in imposing exceptional sentence at petitioner's third sentencing hearing was not contrary to, and did not represent unreasonable application of clearly established federal law under *North Carolina v. Pearce*, and thus did not warrant federal habeas relief, where petitioner's third sentence was lower than his original sentence. 28 U.S.C.A. § 2254.

[3] Jury 230 ⇐34(1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(1) k. In General. Most Cited Cases

Sentencing and Punishment 350H ⇐322

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142 Fed.Appx. 297, 2005 WL 1793351 (C.A.9 (Wash.))
(Cite as: 142 Fed.Appx. 297)

350H Sentencing and Punishment
350HIII Sentencing Proceedings in General
350HII(F) Evidence
350Hk322 k. Degree of Proof. Most Cited Cases

Sentencing court's imposition of exceptional sentence following defendant's convictions for rape, burglary, and robbery did not violate *Apprendi*, where statutory maximum for each offense was life imprisonment, and sentence imposed was for total of 562 months. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254; West's RCWA 9A.20.021(1)(a), 9A.44.040, 9A.52.020(2), 9A.56.200(2).

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John J. Samson, AGWA-Office of the Washington Attorney General, Olympia, WA, for Respondent-Appellee.

Appeal from the United States District Court for the Western District of Washington; Robert S. Lasnik, District Judge, Presiding.

Before TASHIMA, PAEZ, and BEA, Circuit Judges.

MEMORANDUM *

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Lonnie Lee Burton ("Burton") appeals the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1994, a jury convicted Burton of rape in the first degree, robbery in the first degree, and burglary in the first degree. FN1 Burton challenges his consecutive sentence of 304 months for the rape, 153 months for the robbery, and 105 months for the burglary, for a total of 562 months on several constitutional grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm. We review *de novo* a district court's denial of a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir.2001).

FN1. As the parties are familiar with the facts, we do not recite them here.

I.

[1] The state argues that the district court lacked jurisdiction over Burton's 2002 habeas petition because this court had not granted leave to file a " second or successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We disagree. In 1998, Burton filed his first federal habeas petition challenging his conviction. At that time, the state court judgment as it related to Burton's sentence was not yet final because Burton's challenge to his sentence was still pending before the state court of appeal. Because Burton had not yet exhausted his federal constitutional claims in state court at the time he filed his first federal habeas petition, they were not ripe for federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring a state prisoner to exhaust his claims in state court before he is allowed to bring an action in federal court for habeas relief). Therefore, Burton was not required to challenge his sentence in his first federal petition because no meaningful relief would have been available at that time. *See LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir.1999) (order). We agree with the district court *299 that Burton's petition is not "second or successive" because he had a "legitimate excuse for failing to raise a claim at the appropriate time." *See McCleskey v. Zant*, 499 U.S. 467, 490, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

II.

Burton claims that his due process rights were violated when the trial court increased his offender score at the sentencing hearing by separately counting his Indiana theft and fraud convictions, rather than aggregating them as it had done in the first and second sentencing hearings. Because Burton has not shown that the Washington Court of

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Appeals' application of the law of the case doctrine was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1), we affirm the district court's denial of relief on this claim.

III.

[2] Burton next argues that his due process rights were violated because the sentencing court was vindictive in imposing an exceptional sentence at his third sentencing hearing. As the Washington Court of Appeals noted, Burton's third sentence is lower than his original sentence, and is therefore not presumptively vindictive under *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because Burton has not shown that the trial court was vindictive in violation of clearly established federal law, Burton's claim is not cognizable under 28 U.S.C. § 2254(d)(1).

IV.

**2 Finally, Burton argues that his exceptional sentence was imposed in violation of his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We expanded the Certificate of Appealability and requested supplemental briefing on the impact of *Blakely* and *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), on this case.

Although *Apprendi* was decided before Burton's conviction became final and may therefore be applied to this case, the state argues that *Blakely* -decided after Burton's conviction became final-established a new rule that does not apply retroactively on collateral review. *See Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We agree. *See Schardt v. Payne*, 414 F.3d 1025 (9th Cir.2005) (holding that *Blakely* does not apply retroactively to a 28 U.S.C. § 2254 habeas petition).

[3] *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. The statutory maximum for each of the offenses to which Burton was found guilty was life imprisonment. *See* WASH. REV.CODE §§ 9A.44.040(2), 9A.52.020(2), 9A.56.200(2) (classifying rape in the first degree, burglary in the first degree, and robbery in the first degree as class A felonies); § 9A.20.021(1)(a) (setting statutory maximum for class A felonies as life imprisonment). At Burton's third sentencing hearing, the judge imposed consecutive sentences of 304 months for the rape conviction, 153 months for the robbery conviction, and 105 months for the burglary conviction, for a total of 562 months. Because*300 the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*. *See United States v. Shryock*, 342 F.3d 948, 989 (9th Cir.2003) (holding that where statutory maximum for murder in either the first or second degree was life imprisonment, court did not err in sentencing under provision for first degree murder on the basis of judge-found facts); *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir.2002) (holding that *Apprendi* was not violated where sentence imposed did not exceed the statutory maximum); *see also United States v. Buckland*, 289 F.3d 558, 570 (9th Cir.2002) (en banc) (finding no *Apprendi* violation where none of the individual sentences imposed consecutively exceeded the statutory maximum for that offense).

Accordingly, we **AFFIRM.**

C.A.9 (Wash.),2005.
Burton v. Waddington
142 Fed.Appx. 297, 2005 WL 1793351 (C.A.9 (Wash.))

Briefs and Other Related Documents (Back to top)

- 2004 WL 540092 (Appellate Brief) Petitioner-Appellant's Reply Brief (Jan. 20, 2004)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

LONNIE LEE BURTON,

Petitioner - Appellant,

v.

DOUG WADDINGTON,

Respondent - Appellee.

No. 03-35095

D.C. No. CV-02-00140-RSL
Western District of Washington,
Seattle

ORDER

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the petition for rehearing and the petition for rehearing en banc are DENIED.

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CV 02-00140 #00000014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

CASE NO. C02-140L

REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner Lonnie L. Burton is a state prisoner currently incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington. He seeks relief under 28 U.S.C. § 2254 from a 562-month sentence, resulting from his 1994 King County Superior Court conviction on charges of first degree rape, first degree robbery and first degree burglary, with a weapon enhancement on all three. (Dkt. 3.) Specifically, petitioner challenges the 1998 re-sentencing for his 1994 conviction, but not the underlying conviction. After careful consideration of the record, the Court concludes that no evidentiary hearing is required, and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Court of Appeals for the State of Washington summarized the facts of petitioner's case as follows:

> On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home
>
> He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.
>
> After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to Snohomish County deputy prosecutor about the two rape incidents.
>
> Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.
>
> A jury convicted Burton of all three charged crimes About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, [the Court of Appeals] concluded that this sentence was not clearly excessive. But, since Burton was eligible for

> fewer good time credits than in his original sentence, [the Court] presumed vindictiveness following Pearce and its progeny.

(Dkt. 12, Exh. 2 at 2-4 (emphasis in original) (footnotes omitted).) The Supreme Court for the State of Washington denied review of the Court of Appeals' decision on December 3, 1997 (Dkt. 3 at 3.)

On remand, the sentencing court imposed the same 562-month aggregate sentence, but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 103 months. (Dkt. 12, Exh. 1.) The Superior Court entered this second amended judgment and sentence on March 16, 1998. Petitioner again appealed to the Court of Appeals for the State of Washington.

While that appeal of the re-sentencing was pending in state court, petitioner filed a habeas petition in this court on December 28, 1998, challenging the 1994 conviction. (*Id.*, Exh. 5.) This Court consolidated the 1998 petition with another petition that had been filed earlier under Case No. C98-1844L. The Court ultimately denied the consolidated petition with prejudice (*Id.*, Exh. 6.) The Ninth Circuit affirmed the decision in an unpublished opinion *Burton v Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001), *cert. denied*, 122 S. Ct. 1923 (2002).

On July 17, 2000, the Court of Appeals for the State of Washington affirmed petitioner's sentence. (Dkt. 12, Exh. 2.) The Supreme Court for the State of Washington denied review on December 5, 2000. (*Id.*, Exh. 4.) Petitioner then filed a personal restraint petition ("PRP") in the Supreme Court, which raised an *Apprendi* challenge to his sentence. *See In re Burton*, Supreme Court Cause No. 72010-0.

On January 18, 2002, petitioner filed the instant habeas petition. (Dkt. 3.) On the same date, petitioner lodged a motion to stay the proceedings pending the resolution of his PRP in the state courts. (Dkt. 4.) The PRP was denied, and, on April 2, 2002, petitioner's Motion to Modify the Commissioner's Ruling was also denied. (*See* Dkt. 13 at 18.) On April 11, 2002,

the Court ordered a response to petitioner's habeas petition and motion to stay. (Dkt. 5.) As a part of the response, respondent was directed to state whether petitioner had exhausted available state remedies and whether the action may properly be stayed pending a decision by the state Supreme Court on petitioner's PRP. (*Id.* at 2.)

On May 4, 2002, respondent filed a response to the motion to stay the proceedings. (Dkt. 7.) Respondent conceded that petitioner's claims have been exhausted, but asserted that this Court lacks subject matter jurisdiction over the petition because petitioner failed to obtain permission from the Ninth Circuit Court of Appeals to file the petition as required under 28 U.S.C. § 2244(b)(3)(A) for "second or successive" habeas actions [1] Respondent thus argued that the Court should deny the motion to stay the petition. (*Id.* at 2.) Alternatively, respondent argues that petitioner's motion to stay should be denied because the petition constitutes an abuse of the writ as petitioner could have raised the claims in his previous 1998 petition. (*Id.* at 3.) Petitioner filed a reply on May 13, 2002, arguing that his current challenge was not exhausted in 1998 and, therefore, could not have been brought with his previous claims. (Dkt. 8.)

The Court was not convinced that petitioner's habeas action should be dismissed for lack of subject matter jurisdiction, and ordered respondent to file an Answer to the habeas petition which specifically addressed the issue of "second or successive petitions," as well as whether petitioner's sentencing claims were ripe at the time he filed his first habeas petition. (Dkt. 10.)

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[1] In Case No. C98-1844L, petitioner challenged the sentence in a different case: his 1992 convictions of second degree rape of a child, second degree child molestation and second degree exploitation of a minor. (*See* Case No. C98-1844L, Dkt. 2.) In Case No. C98-1846L, petitioner challenged specific evidence admitted during the 1994 trial in this case, which resulted in convictions of first degree rape, first degree robbery and first degree burglary. (*See* Case No. C98-1846L, Dkt. 2.) The 1994 convictions underlie petitioner's exceptional sentence which he challenges in the instant habeas action.

On August 16, 2002, respondent filed an Answer and Memorandum of Authorities. (Dkt. 11) On September 5, 2002, petitioner filed his Response. (Dkt. 13.) The briefing is now complete and the petition is ripe for review.

GROUNDS FOR REVIEW

In his habeas petition, petitioner alleges that his due process rights were violated in four respects when (1) the trial court improperly increased his offender score at sentencing; (2) the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered; (3) the trial judge was actually vindictive against him; and (4) the sentence petitioner received which was in excess of the top range set by statute was based on factors not submitted to a jury nor proved beyond a reasonable doubt. (Dkt 3 at 5-6.)

DISCUSSION

Exhaustion

It is well established that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. *Johnson v Zenon*, 88 F 3d 828, 829 (9th Cir. 1996). Respondent concedes that petitioner has exhausted his habeas corpus claims and, thus, habeas review is appropriate.[2] (Dkt. 11 at 4); *see also Gray v Netherland*, 518 U.S. 152, 162-63 (1996) (discussing the exhaustion doctrine)

Standard of Review

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was

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[2] Petitioner initially moved to stay the habeas proceeding while he pursued an *Apprendi* claim by way of PRP in the Supreme Court for the State of Washington. (Dkt. 4) However, the PRP has since been denied and respondent concedes exhaustion of all claims. Thus, petitioner has now withdrawn his motion to stay. (Dkt. 13 at 7.)

contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S C. § 2254(d)

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law, or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. *See Williams v Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id* The Ninth Circuit has interpreted "an unreasonable application of law" to mean an application that is "clearly erroneous." *Van Tran v Lindsey*, 212 F 3d 1143, 1152-54 (9th Cir.), *cert denied*, 531 U S. 944 (2000).

In addition, if a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Second or Successive Petitions

Respondent initially contends that this Court lacks jurisdiction to review petitioner's habeas claims because petitioner has failed to obtain permission from the Ninth Circuit Court of Appeals to file a "second or successive" petition as mandated by 28 U.S.C § 2244(b)(3)(A). (Dkt. 11 at 6.) Respondent argues that the instant petition is "second or successive" because petitioner's current sentencing claim was ripe at the time he filed his 1998 habeas petition, and therefore, he should have either raised it at that time, or he should have waited to file a petition

until his sentencing claim was exhausted.[3] (Dkt. 11 at 6-8) Respondent concludes that because petitioner chose to file a habeas petition in 1998 that did not include the current sentencing claim, he cannot return to federal court to pursue relief now without first satisfying 28 U.S.C. § 2244(b). (*Id.* at 9.)

Petitioner answers that while his claims challenging his conviction were ripe for review in 1998, and were at risk of being precluded by the statute of limitations if not filed at that time, his current sentencing challenge was not ripe because it had not yet been exhausted in the state courts. (Dkt. 13 at 7.) Petitioner further argues that, in fact, at the time he filed the challenges to his conviction in this Court, he had just been re-sentenced for a third time and he had filed a direct appeal in the Court of Appeals for the State of Washington; therefore, it would have been improper to raise the sentencing claim in 1998. (*Id.* at 7-8.) Petitioner also contends that he could not have waited until his sentencing appeal had been exhausted before filing his challenge to the underlying conviction, as the conviction had been affirmed on appeal in the state courts, and any claim challenging that conviction in federal court would have expired in January 1999. (*Id* at 7.) For the following reasons, the Court agrees.

As a threshold matter, the Court finds that petitioner's current sentencing claim was not ripe for review at the time he filed his first habeas petition in 1998. Indeed, the parties agree that petitioner had not exhausted the claim in the state courts at the time of filing, and therefore, this Court could not have reviewed it. (*See* Dkt. 11 at 8-9.) Thus, had petitioner raised the claim in 1998, he would have presented a "mixed petition," which would have necessarily been dismissed by this Court until his sentencing claim was exhausted. *See Rose, supra.* Yet, this is exactly the scenario that respondent asserts should have occurred. (*Id.* at 6) Respondent then concedes that had petitioner raised the sentencing claim in his first petition, and had the Court

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[3] It is not clear to the Court how respondent determined petitioner's claim to be both "ripe for review" and "unexhausted" at the same time. (*See* Dkt. 11 at 8-9)

then dismissed the petition without reaching the merits, petitioner would not now be filing a "second or successive" petition, as supported by *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998) (holding that a claim previously dismissed as premature does not qualify as "second or successive" for Antiterrorism and Effective Death Penalty Act's ("AEDPA") purposes), and *LaGrand v Stewart*, 170 F.3d 1158 (9th Cir. 1999) (holding that petitioner was not required to obtain leave to file a second or successive habeas petition where that claim was not ripe at the time of petitioner's first habeas petition). (Dkt. 11 at 7.)

The Court finds respondent's argument to be misguided. A previously filed habeas petition does not necessarily render a subsequent petition "second or successive." *See Hill v Alaska*, 297 F.3d 895 (9th Cir 2002). In *Hill*, the Ninth Circuit stated that since "AEDPA does not define the terms 'second or successive[,]' [t]he Supreme Court, the Ninth Circuit, and our sister circuits have interpreted the concept incorporated in this term of art as derivative of the 'abuse-of-the-writ' doctrine developed in pre-AEDPA cases." *Hill*, 297 F 3d at 897-98 (citations omitted). In *McCleskey v Zant*, 499 U.S. 467 (1991), the Supreme Court explained that "the abuse-of-the-writ doctrine . . . [has] concentrate[d] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. In the instant case, petitioner did not raise the challenge to his sentence in his 1998 petition because he knew to do so would be futile (*See* Dkt. 13 at 8-9.) The claim was pending on direct appeal in the state courts and therefore this Court could not have reviewed it. Although petitioner had been sentenced, and arguably had the facts available on which to base a claim in his first habeas petition, he was precluded by law from properly raising it until the state courts' final decisions had been rendered. It was not until 2000 that the sentencing court's decision became final. (Dkt. 12, Exh. 4.) It would be illogical to require petitioner to preserve his sentencing claim by raising it before it was ripe for review (and quite possibly moot depending on the outcome in the state appeals court), only to result in this Court dismissing the

claim as unexhausted, just so that he could later bring a second habeas petition without leave of the Ninth Circuit.

Respondent argues alternatively that petitioner should have waited to file all of his claims until after his sentence became final in December 2000. (Dkt 11 at 8-9.) This, too, is misguided. Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present them in 2002 due to the one-year statute of limitations imposed under AEDPA. Arguably, petitioner's conviction became final on June 9, 1997, when the Court of Appeals for the State of Washington affirmed his conviction but overturned his sentence. (Dkt. 12, Exh 3.) His case was remanded to the trial court solely for the purpose of re-sentencing. While petitioner continued to challenge his new sentence on direct appeal, his claims challenging the conviction had been exhausted. In fact, this Court, in reviewing petitioner's 1998 petition, agreed that his claims were ripe for review. (*See* Case No. C98-1844L, Dkt. 38.) This Court determined that the properly exhausted claims should be addressed on the merits, and subsequently denied them as without merit. (*See id* at 16) Thus, this Court apparently agreed that petitioner's conviction was final and ripe for review, despite the pending appeal of his sentence.

In *Martinez-Villareal*, *supra*, the Supreme Court addressed the situation where a petitioner has raised a claim in his first petition, which is then dismissed by the District Court as premature, and then is raised later in a second habeas petition when it becomes ripe for review. *Martinez-Villareal*, 523 U S. at 643. In that case, the government argued that because the petitioner had already raised the claim in his first petition, he must obtain leave from the Circuit Court before proceeding with a second habeas challenge. *Id* The Court rejected the argument, stating that "[i]f [the government's] interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal*, 523 U.S. at 644. While the Court limited its holding to cases where a claim has been

previously raised, dismissed as premature, and then re-raised, this Court finds that the same reasoning applies to the instant case. *See Martinez-Villareal*, 523 U.S. at 645 n.*

In both situations, the petitioner has not received an adjudication of his claim by the federal court. The *Martinez-Villareal* Court recognized the necessity of exhausting claims in the state courts before allowing habeas review. The holding was grounded on the fact that petitioner's claim was premature and could not be heard by the federal court in his first petition, not on the fact that he had given notice to the Court by raising it once prematurely and then raising it a second time when it was ripe. *See Martinez-Villareal*, 523 U.S. at 644-45. Although the Court also stated that the *Martinez-Villareal* case did not present a situation where a petitioner was raising a claim for the first time in a second petition, as is the instant case, the Court did not say this situation would result any differently *Martinez-Villareal*, 523 U.S. at 645 n.*. Rather, the Court stated that it "ha[d] no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id*

Finally, in *LaGrand, supra*, the Ninth Circuit held that a petitioner is not required to obtain leave from the Ninth Circuit to file what is "functionally" a first petition as to a previously unripe claim *LaGrand*, 170 F.3d at 1160. Again, respondent argues that this case does not apply to the instant situation because petitioner is raising a new claim for the first time, and *LaGrand* involved a petitioner who had raised the claim in his first petition, the Court dismissed it as unripe, and then the petitioner raised it again when it became ripe. (Dkt. 11 at 7-8) The Court finds this difference to be immaterial. In *Hill, supra*, the Ninth Circuit recognized that the term "second or successive" did not apply "if the [petitioner] did not have an opportunity to challenge the state's conduct in a prior petition." *Hill*, 297 F.3d at 898. Here, petitioner did not have the opportunity to challenge his sentence in 1998 because his sentencing claim was not ripe for review as respondent asserts. Moreover, as discussed above, petitioner could not have waited to file his 1998 petition or he would have risked losing the opportunity to

challenge his underlying conviction. Therefore, the Court finds that the instant habeas petition is not "second or successive," and thus, does note require leave under 28 U S C § 2244(b) to pursue the claim on the merits.

Claims One, Two and Three - Improper Increase in Offender Score/Vindictiveness

Petitioner first claims that his due process rights were violated when the sentencing court improperly increased his offender score at his third re-sentencing in order to justify imposing an exceptional sentence (Dkt. 3 at 5.) Petitioner argues that his three previous King County convictions should have been merged for sentencing purposes, but that instead, the sentencing judge, with actual vindictiveness, chose to un-merge all prior convictions in order to continue to impose an exceptional sentence. (Dkt 13 at 9-10.) Petitioner concludes that had the sentencing judge merged all prior convictions, his offender score would have been 9 instead of 16, and therefore, his sentence would have been less severe. (*Id.* at 15.) Petitioner also argues that the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered. (Dkt. 3 at 5.) Respondent answers that the state courts reasonably denied petitioner's claims because the Superior Court properly sentenced petitioner under Washington law, and because petitioner has failed to prove actual vindictiveness. (Dkt. 11 at 11.)

In denying petitioner's first claim, the Court of Appeals for the State of Washington stated:

> Burton argues that the sentencing court exceeded its scope on remand and invoked a Pearce presumption (again) by imposing the same aggregate sentence. The Pearce presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. Pearce, 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the Pearce presumption does not arise. State v. Larson, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence

Nonetheless, the Pearce presumption also arises when parole considerations can make the period of incarceration under the amended sentence longer than the original sentence. See Steele, 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. Burton, 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A150(1) After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent. RCW 9.94A.150(1) He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. Burton, 1997 WL 306429 at *14. His new sentence is slightly less severe than his original sentence. Accordingly, the Pearce presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. State v. Worl, 129 Wn.2d 426, 425, 918 P.2d 905 (1996). Except, the doctrine is discretionary when controlling law changes between the appellate decision and proceedings on remand. Coffel v. Clallam County, 58 Wn.App. 517, 521, 794 P 2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A 360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. State v. Bolar, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. Bolar, 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	Sentence Date	Cause No.	Score
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E01 9110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3
Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of a Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			16

Following Bolar, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses. Therefore, the court did not exceed the scope of remand.

(Dkt. 12, Exh. 2 at 6-8 (footnote omitted).)

Petitioner relies on the "law of the case doctrine" for the proposition that the sentencing judge was required to use the same method of computing his offender score because the Court of Appeals for the State of Washington had affirmed the calculation; thus, the judge should have merged his prior King County convictions as she had done with the prior Indiana convictions, instead of un-merging the Indiana convictions so that she could also count the King County convictions separately. (Dkt. 13 at 10-11.) Petitioner's reliance on the doctrine is misplaced.

In *Jeffries v Wood*, 114 F.3d 1484 (9th Cir. 1997), the Ninth Circuit Court of Appeals explained that the "law of the case is a discretionary doctrine," and that the doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Jeffries*, 114 F.3d at 1489 (quoting *Messenger v Anderson*, 255 U S. 436, 444 (1912)); *see also Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is

discretionary, not mandatory."). The Ninth Circuit noted, however, that this discretion is not unlimited. The Court stated that "the prior decision should be followed unless: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, *(2) intervening controlling authority makes reconsideration appropriate*, or (3) substantially different evidence was adduced at a subsequent trial.'" *Jeffries*, 114 F.3d at 1489 (emphasis added) (footnote and citations omitted).

In the instant case, new controlling authority was created between the date of the appellate decision and the date of petitioner's third re-sentencing. (*See* Dkt. 13 at 9-10.) This created an exception to the "law of the case" doctrine, and provided a basis for the sentencing judge to reconsider the calculation of petitioner's offender score. Therefore, the Court of Appeals' decision pertaining to the re-calculation of petitioner's offender score was not contrary to, or an unreasonable application of, established federal law.

Petitioner next claims that the trial court erred in considering additional aggravating factors on remand, specifically one that had been raised before and then rejected, and one that had never been offered on the evidence. (*Id.* at 13.) The state appeals court had rejected this claim on the basis that the sentencing judge's decision had also been based on aggravating factors that were presented at earlier sentencing hearings, and therefore, found no error in citing to the additional factors. (Dkt. 11 at 16.) Petitioner does not articulate a specific objection to that decision, other than that it gives rise to the conclusion that the sentencing judge was actually vindictive, as discussed below. (*See* Dkt. 13 at 14-16.)

Petitioner argues that the cumulation of the trial judge's decisions during petitioner's third re-sentencing proves her actual vindictiveness. (*Id.* at 13-16.) Petitioner cites to the fact that: (1) this was the third time she had been asked to re-sentence him; (2) she un-merged his prior convictions in order to preserve the exceptional sentence she had already imposed, (3) she cited to new aggravating factors in support of the new sentence, and (4) she imposed an

"alternative" sentence in case her aggregate sentence was reversed on appeal.[4] (Dkt. 13 at 14-15.) Petitioner states that "[a]lthough the actual sentence [he] received at the third sentencing was arguably 'not more severe' than the sentence he received at the previous sentencing, it was more severe than the sentence he should have received if the sentencing judge did not go out of her way to reverse her previous rulings and adopt new and previously-rejected aggravating factors." (Dkt 13 at 14.)

In *North Carolina v Pearce*, 395 U.S. 711 (1969), the Supreme Court held that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. The Court further held that "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear." *Id.* at 726. Here, petitioner did not receive a more severe sentence than was previously imposed, and, in fact, he is now eligible for slightly more "good time credit" (Dkt. 12, Exh. 2 at 7.) Therefore, the *Pearce* presumption of vindictiveness does not arise as a result of imposing the same aggregate sentence. Petitioner argues, however, that the presumption arises because the judge actually raised his offender score for the third sentence. (Dkt. 13 at 15.) The Court disagrees with this argument since it has already determined that the new calculation of petitioner's offender score did not violate his constitutional rights, as discussed above.

Petitioner further argues that "'where the prophylactic rule of Pearce does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing.'"

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[4] The Court of Appeals for the State of Washington subsequently vacated the "alternative" sentence imposed by the trial judge at the same time the Court affirmed petitioner's third sentence. (Dkt. 12, Exh. 2 at 11-12.)

(Dkt. 13 at 14 (quoting *Texas v McCullough*, 475 U.S. 134, 138 (1986) (citation omitted).) The Court does not believe petitioner has proven actual vindictiveness. First, petitioner received a "better" sentence than he had received earlier as he now has an opportunity to earn more early release credits. Second, as discussed above, the Court has found that there was no impropriety in recalculating his offender score. Third, although the sentencing judge cited additional aggravating factors in support of the imposed exceptional sentence, the "exceptionality" of the sentence did not rely on the additional factors, so there was no prejudice to the petitioner by citing them. (*See* Dkt. 12, Exh. 2 at 11.) Finally, the state court of appeals noted that the presumption of vindictiveness had arisen from petitioner's second re-sentencing "only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. . . . The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton." (Dkt. 12, Exh. 2 at 5.) Therefore, the fact that the *Pearce* presumption was applied to petitioner's re-sentencing previously does not convince the Court that the judge was actually vindictive at the third re-sentencing. Thus, petitioner's claims that his sentence violated his due process rights fails

Finally, petitioner argues that his sentence violates the recent decision by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v Arizona*, __ U.S. __, 122 S. Ct. 2428 (2002), in that the sentenced imposed was above the statutory maximum and was based on factors determined by the judge, not the jury. (Dkt 13 at 17-27.) Respondent answers that petitioner's sentence does not exceed the statutory maximum for his crime, so *Apprendi* and *Ring* do not apply. (Dkt. 11 at 17.) The Court agrees with respondent. Petitioner attempts to assert that he is serving 562 months only for his first degree rape conviction, while ignoring the fact that he was also convicted of first degree robbery and first degree burglary, with a weapon enhancement on all three crimes. Petitioner actually received an aggregate 562-month sentence for all three counts - 304 months for the rape count, 153

months for the robbery count and 105 months for the burglary count, to run consecutively. (Dkt. 12, Exh. 2 at 4) Petitioner concedes that the maximum penalty he could have received for the rape was 304 months. (Dkt. 13 at 25.) This is, in fact, what he received. Petitioner makes no mention of the other two parts of his aggregate sentence. Thus, petitioner's sentence was not outside the statutory maximum for his crime, and he fails to show any due process violation Accordingly, the Court should dismiss petitioner's habeas action with prejudice.

CONCLUSION

For the reasons set forth above, I recommend petitioner's claims for federal habeas relief be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation

DATED this 8 day of November, 2002.

JOHN L. WEINBERG
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
JOHN L. WEINBERG
UNITED STATES MAGISTRATE JUDGE

304 U.S. COURTHOUSE
SEATTLE, WA 98104
(206) 553-5774

November 8, 2002

FILED
LODGED
ENTERED
NOV - 8 2002
AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON
DEPUTY

Mr. Lonnie L. Burton
978598
Stafford Creek Correction Center
191 Constantine Way
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Mr John J. Samson
Attorney General's Office
Criminal Justice Division
P O Box 40116
Olympia WA 98504-116

Re: Lonnie L Burton v Doug Waddington
C02-140L

Dear Mr. Burton and Mr. Samson:

Enclosed are copies of my Report and Recommendation, proposed order and proposed judgment in the above-captioned case. The originals are being filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Objections to the recommendation should be filed and served within **twenty-one** days of the date of this letter with copies to the Clerk for forwarding to the District Judge and to my office. Failure to file objections within the specified time waives the right to appeal any order by the District Court adopting this report and recommendation. In accordance with our local rules, you should note your objections for consideration on the Judge's motion calendar for the third Friday after they are filed. If no timely objections are filed, the matter will be ready for consideration by the District Judge on December 6, 2002.

Thank you for your cooperation.

Very truly yours,

John L. Weinberg
United States Magistrate Judge

JLW/jvl
Enclosures

cc: Hon. Robert S. Lasnik
Court File C02-140L

FILED ENTERED
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NOV - 8 2002
AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent

CASE NO. C02-140L

ORDER DENYING HABEAS PETITION

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg.

DATED this _____ day of _____, 2002.

ROBERT S. LASNIK
United States District Court Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

LONNIE L. BURTON

Petitioner,

v

DOUG WADDINGTON,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C02-140L

__ **Jury Verdict** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

_X_ **Decision by Court.** This action came to consideration before the Court

IT IS ORDERED AND ADJUDGED The Report and Recommendation is adopted and approved. Petitioner's Petition for Writ of Habeas Corpus is denied and dismissed with prejudice

Dated this _____ day of _____, 2002

BRUCE RIFKIN
Clerk

Deputy Clerk

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON,

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DOUG WADDINGTON,

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CASE NO. C02-140L

ORDER DENYING HABEAS PETITION

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice.

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg.

DATED this 17th day of December, 2002.

ROBERT S. LASNIK
United States District Court Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C02-140L

— **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to consideration before the Court.

IT IS ORDERED AND ADJUDGED: The Report and Recommendation is adopted and approved. Petitioner's Petition for Writ of Habeas Corpus is denied and dismissed with prejudice.

Dated this 17 day of Dec., 2002.

BRUCE RIFKIN
Clerk

Deputy Clerk

Cpz PSL Jun KC

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